

No. 13082

**United States
Court of Appeals**
for the Ninth Circuit.

JOHN COSTELLO, Trustee of the Estate of
ANGELO PAGLIARO, Bankrupt,
Appellant,
vs.
C. N. GOLDEN,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellant.

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Richmond, California,
Attorneys for Appellee.

United States District Court for the Northern
District of California, Southern Division

No. 39166 In Bankruptcy

In the Matter of:

ANGELO PAGLIARO,

Bankrupt.

ORDER OF ADJUDICATION AND
REFERENCE

At San Francisco, in said District, on the 5th day of September, 1950.

The Petition of Angelo Pagliaro, filed on the 5th day of September, 1950, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered, and no opposition being made thereto,

It Is Adjudged that the said Angelo Pagliaro bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it is hereby referred to Bernard J. Abrott, one of the Referees in Bankruptcy of this Court who will be in charge thereof, and to Burton J. Wyman, Referee in Bankruptcy of this Court, in the event Bernard J. Abrott, shall be unable to act to take such further proceedings therein as are required and permitted by said Act, and that the said Angelo Pagliaro shall henceforth attend before the said Referee and submit to such orders as may

be made by him or by a Judge of this Court, relating to said bankruptcy.

It Is Further Order that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Inter-City Express," a newspaper published in the County of Alameda, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated Sept. 5, 1950.

/s/ LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed September 5, 1950.

[Title of District Court and Cause.]

ORDER APPROVING BOND

It Appearing to the Court that John Costello, of the City of Oakland, California, in said District, has been duly appointed Trustee of the Estate of the above-named Brankrupt, and has given a Bond with sureties for the faithful performance of his official duties in the amount fixed by the Referee, to wit: \$200.00.

It Is Hereby Ordered, that the said Bond be, and the same is hereby approved.

Dated at Oakland, California, the 26th day of September, 1950.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed September 26, 1950, Referee.

[Endorsed]: Filed September 29, 1950, U.S.D.C.

[Title of District Court and Cause.]

PETITION FOR TURN OVER ORDER

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The Petition of John Costello respectfully represents:

That your Petitioner is the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above named.

That at the time of the filing of the Petition in Bankruptcy said Bankrupt was in possession of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkeley, which personal property was being purchased by said Bankrupt from C. N. Golden.

That subsequent to the filing of the Petition in Bankruptcy and during the month of October, 1950, said Bankrupt turned over said property to C. N. Golden, who sold the same for the same for \$4,-750.00, which sum your Petitioner believes was the reasonable value of said property.

That your Petitioner has been advised that said property was being purchased by said Bankrupt from C. N. Golden on a Conditional Sales Contract and that at the time said property was turned over by said Bankrupt to said C. N. Golden there was a balance due under said contract of \$3,676.00, but your Petitioner has no information or belief as to the validity of said Conditional Sales Contract.

Wherefore, your Petitioner prays that an Order be made and entered herein requiring C. N. Golden to turn over to your Petitioner for administration in the above-entitled proceedings the sum of \$4,750.00, or, in the event that it is found that said Conditional Sales Contract was a valid contract reserving title to C. N. Golden, that said C. N. Golden be required to turn over to your Petitioner the sum of \$1,074.00, and for such further and other order as may be just and proper in the premises.

/s/ JOHN COSTELLO,
Trustee.

SHAPRO & ROTHSCHILD,
By /s/ AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

United States of America,
Northern District of California,
County of Alameda—ss.

I, John Costello, the Petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true ac-

ording to the best of my knowledge, information and belief.

/s/ JOHN COSTELLO.

Subscribed and sworn to before me this 18th day of January, 1951.

[Seal] /s/ HOMER E. NORTH,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed January 18, 1951, Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and consideration of the verified Petition of John Costello, Trustee herein, praying for an Order requiring C. N. Golden, to turn over to said Trustee for administration in these proceedings, the sum of \$4,750.00, or, in the event that it is found that the Conditional Sales Contract referred to in the Petition for Turn Over Order, dated January 18, 1951, on file herein, was a valid contract reserving title to said C. N. Golden, that said C. N. Golden be required to turn over to said Trustee the sum of \$1,074.00, and the Court being fully advised in the premises, and this being a proper case for this Order, now on motion of Messrs. Shapro & Rothschild, attorneys for said Trustee,

It Is Hereby Ordered that said C. N. Golden, show cause before me, the undersigned Referee in Bankruptcy, at my courtroom, Room 1104, Tribune

Tower, 13 and Franklin Streets, Oakland 12, California, on the 30th day of January, 1951, at the hour of 11:00 o'clock a.m., if any he has, why said Petition should not be granted.

It Is Further Ordered that service of this Order be made by delivering a copy thereof to C. N. Golden at least seven (7) days prior to the return date hereof.

It Is Further Ordered that said C. N. Golden serve upon Messrs. Shapro & Rothschild, the attorneys for said Trustee, at their office, 155 Montgomery Street, San Francisco, California, and file with the above-entitled Court, his return to this Order at least two (2) days prior to the return date hereof, failing which the relief prayed for by said Trustee will be granted by default.

Dated this 18th day of January, 1951.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed January 18, 1951, Referee.

[Title of District Court and Cause.]

ANSWER TO PETITION OF TRUSTEE FOR
TURN OVER ORDER AND PETITION
FOR RECLAMATION OF ASSETS HELD
BY TRUSTEE

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The answer of C. N. Golden respectfully states:

That C. N. Golden at all times mentioned herein was and now is the vendor of a Conditional Sales

Contract dated July 7, 1950, and recorded in the Office of the Recorder, County of Alameda, State of California, July 12, 1950, of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berekely, California, which personal property was being purchased by the above-named Bankrupt under said Conditional Sales Contract.

That the trustee has not elected to assume the above-mentioned Conditional Sales Contract;

That more than 60 days have expired since the adjudication of the above-named Bankrupt;

That said property mentioned in the first paragraph above was sold by the Vendor, C. N. Golden, under an executory contract of sale without petitioning the above-entitled Court;

That the Vendor, C. N. Golden, has not made any money to date from the sale of the above-mentioned personal property since the first sale of same to the above-named Bankrupt.

Wherefore, said Vendor, C. N. Golden, prays that the Petition of Trustee be dismissed and for such further relief as may seem just in the premise.

The Petition of C. N. Golden respectively shows:

That C. N. Golden is the Vendor of a Conditional Sales Contract of Personal Property dated July 7, 1950, of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkley, California, now in the possession and/or control of the Trustee;

That said Trustee has not elected to fulfill the Conditional Sales Contract;

That more than 60 days has elapsed since the

adjudication of the above-mentioned Bankrupt;

That said Vendor has received no moneys under the terms of the Conditional Sales Contract from the Trustee;

That said Vendor as and part of the Conditional Sales Contract undertook to lease and did lease to the said Bankrupt the premises at 1819 University Avenue;

That said Trustee has not elected to assume the above-mentioned lease of real property;

That said Vendor has spent more than \$1,000.00 to preserve and maintain the said premises and/or personal property located at same address;

That said Petitioner, C. N. Golden, has received no money from the Trustee as and for the preservation of said assets of the Bankrupt and has received no money on behalf of said Conditional Sales Contract or any money whatsoever from the Trustee since the Adjudication of the Bankrupt.

That under the terms of said Conditional Sales Contract and under the Laws of the State of California, said Petitioner has the right to declare the Contract at an end, and in such case to retain all payments paid thereunder as liquidated damages for nonperformance of the contract on the part of said buyer, and for use of and injury to said property;

That the Vendor hereby exercises his rights under the Contract and the Laws of the State of California and declares the Contract at an end.

Wherefore, the petitioner prays that an order be made and entered herein requiring the Trustee to turn over to Petitioner C. N. Golden, the possession

of said personal property; that title to said personal property be reclaimed to said petitioner, that the Contract be declared at an end, and that the said lease to the above-described piece of real property be declared at an end, and for such other and further order as may be just and proper in the premises.

/s/ C. N. GOLDEN,

Vendor and Petitioner.

MORAN AND MILLSPAUGH,

By /s/ PHILLIP M. MILLSPAUGH,

Attorneys for Vendor and
Petitioner.

United States of America,
Northern District of California,
County of Contra Costa—ss.

I, C. N. Golden, the Petitioner and Vendor named in the foregoing Petition and Answer, do hereby make solemn oath that the statements contained therein are true to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 26th day of January, 1951.

[Seal] /s/ WALTER R. KOSICK,
Notary Public in and for the County of Contra
Costa, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 30, 1951, U.S.D.C.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR RECLAMATION
OF ASSETS

Now comes John Costello, as Trustee of the estate of the Bankrupt above named, and in answer to the Petition of C. N. Golden for reclamation of assets, admits, denies and alleges as follows:

1. That said Trustee has never seen the Conditional Sales Contract or the Lease referred to in said Petition, and on that ground denies that there was a Conditional Sales Contract or a Lease between said Bankrupt and said Petitioner in Reclamation.

2. That said Trustee has no information or belief as to whether said Petitioner in Reclamation has spent any money to preserve or maintain the premises or the personal property.

3. That said Trustee does not have in his possession, and never has had in his possession, the furniture, fixtures or equipment located at the time of the filing of the Petition in Bankruptcy at 1819 University Avenue, Berkeley.

Wherefore, said Trustee prays that said Petition in Reclamation be denied.

/s/ JOHN COSTELLO,

SHAPRO & ROTHSCHILD,

By /s/ AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

United States of America,
Northern District of California,
County of Alameda—ss.

John Costello, the Trustee named in the foregoing Answer to Petition for Reclamation, does hereby make solemn oath that he has read said Answer and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein set forth on information and belief and as to them he believes them to be true.

/s/ JOHN COSTELLO.

Subscribed and sworn to before me this 30th day of January, 1951.

[Seal] /s/ HOMER E. NORTH,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed January 30, 1951, Referee.

[Title of District Court and Cause.]

TURN OVER ORDER

The Petition of John Costello, as Trustee of the estate of the Bankrupt above named for an order requiring C. N. Golden to turn over to said Trustee the sum of \$1,074.00, having come on regularly to be heard on the 30th day of January, 1951, said Trustee in Bankruptcy appearing by Messrs. Shapro & Rothschild, his attorneys, and C. N.

Golden appearing by Messrs. Moran & Millspaugh, his attorneys, and evidence both oral and documentary having been introduced.

The Court hereby finds that at the time of the filing of the Petition in Bankruptcy herein, Angelo Pagliaro, the bankrupt above named, was in possession of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkeley, which furniture, fixtures and equipment were being purchased by said bankrupt from C. N. Golden under a Contract of Conditional Sale on which there was a balance due of \$3,676.00, and which furniture, fixtures and equipment were then worth the sum of \$4,750.00; that subsequent to the filing of the Petition in Bankruptcy and without leave of the above-entitled court, said C. N. Golden took possession of said furniture, fixtures and equipment from said Bankrupt and thereafter sold the same for the sum of \$4,750.00; that in order to effect a sale it was necessary for C. N. Golden to pay the sum of \$475.00 as a brokerage fee, for which said commission said C. N. Golden is entitled to credit,

And the court being fully advised in the premises, and this being a proper case for this order,

It Is Hereby Ordered that the Petition in Reclamation of said C. N. Golden, be denied.

It Is Further Ordered that C. N. Golden forthwith turn over and pay to John Costello, as Trustee of the estate of the bankrupt above named, the sum of \$599.00, said sum being the reasonable value of said personal property as represented by the sale

price thereof, less the balance due said C. N. Golden on his Conditional Sales Contract and less the brokerage commission paid by said C. N. Golden for the sale thereof.

It Is Further Ordered that this order is without prejudice to the rights of said C. N. Golden to file a general unsecured claim in these proceedings for any sum due him at the time of the filing of the petition in bankruptcy herein, other than the balance then due him on said Conditional Sales Contract.

Dated this 6th day of March, 1951.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed March 6, 1951, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
TURN OVER ORDER

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The Petition of C. N. Golden Respectfully Represents:

That a final Turn Over Order was served upon your Petitioner on or about March 6, 1951, in the City of Richmond, County of Contra Costa, State of California;

That your petitioner, C. N. Golden, sold furni-

ture, fixtures and equipment to the bankrupt named above under a Conditional Sales Contract dated July 7, 1950, in which Contract your Petitioner reserved title in himself until the Contract price of \$4,776.00 was paid in full by the above-named Bankrupt;

That said Bankrupt began making payments under the terms of said Contract but never did complete all his payments thereto;

That said Bankrupt was adjudicated a Bankrupt on the 5th day of September, 1950;

That the trustee in the above-entitled action has not elected to assume the above-mentioned Conditional Sales Contract nor to fulfill any of the terms and conditions of said executory contract;

That your petitioner, C. N. Golden, has received no money from the Trustee toward fulfillment of said Conditional Sales Contract;

That your Petitioner has expended \$3,327.27, to preserve and save the Property and Business left by the Bankrupt upon his abandonment of same in order to cut down on the loss in money to your Petitioner from the abandonment of said Conditional Sales Contract by the Bankrupt, Angelo Pagliaro, and the Trustee for said Bankrupt;

That your Petitioner, C. N. Golden, filed a Petition with said Court for Reclamation of Assets claimed to be held by the Trustee for the Bankrupt;

That the Turn Over Order issued on March 6, 1951, was in direct contravention of the Laws of the United States of America, Title 11, Section 70-b;

That no preference was shown by the Court in the amount of its order to turn over \$599.00, in its findings of fact as recited in the Turn Over Order, dated March 6, 1951.

Wherefore, your petitioner, C. N. Golden, prays for a reversal of the Turn Over Order; for a stay of execution of the order pending a review of the Referee's decision; for reclamation of assets held by the Trustee; and for such other and further order as may be just and proper in the premises.

/s/ C. N. GOLDEN,

MORAN AND MILLSPAUGH,

By /s/ PHILLIP M. MILLSPAUGH,

Attorneys for Petitioner.

United States of America,
Northern District of California,
County of Alameda—ss.

I, C. N. Golden, the Petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 14th day of March, 1951.

[Seal] /s/ PHILLIP M. MILLSPAUGH, JR.,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed March 16, 1951, Referee.

[Title of District Court and Cause.]

AMENDED PETITION FOR REVIEW OF
REFEREE'S TURN OVER ORDER AND
DENIAL OF PETITION IN RECLAMA-
TION

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The Petition of C. N. Golden, respectfully represents:

That a final Turn Over Order was signed by Honorable Bernard J. Abrott, Referee in Bankruptcy, in the above-entitled case against the petitioner, C. N. Golden, on the 6th day of March, 1951.

That said final Turn Over Order made findings of fact to the effect, Angelo Pagliaro, the bankrupt above named was in possession of the furniture, fixtures and equipment of a certain restaurant at 1819 University Avenue, Berkeley, California, which furniture, fixtures and equipment were being purchased by said Bankrupt from C. N. Golden, your petitioner, under a Contract of Conditional Sale, on which there was a balance due of \$3,676.00 and which furniture, fixtures and equipment were worth the sum of \$4,750.00; that C. N. Golden without leave of the above-entitled Court and thereafter sold the same for \$4,750.00, and that in order to effect a sale it was necessary for C. N. Golden to pay the sum of \$475.00, as brokerage fee, for which said commission said C. N. Golden is entitled to credit; that said order denied the petition of C. N. Golden

for Reclamation and ordered C. N. Golden to turn over and pay to John Costello as trustee of the estate of said bankrupt the sum of \$599.00.

That said Turn Over Order and Denial of Petition for Reclamation was in error in the following respects:

1. That the conditional sales contract as set forth in the Turn Over Order, described above, was valid under the laws of the State of California; that said contract contained a clause allowing the seller to repossess the said property and declare the contract at an end in case of default in any of the payments when due and said seller may keep any payments made under the contract as liquidated damages for non-performance of the contract; that said order ignored the right of a conditional seller under the laws of the State of California to repossess his property and the many federal decisions upholding the right of a conditional seller to obtain a reclamation order upon default by a buyer.

2. The Turn Over Order was in direct contravention of the Codes of the Laws of the United States, Title 11, Section 70-b, which states a trustee must elect to assume an executory contract within 60 days after adjudication; the trustee has not to date elected to assume said contract nor has he endeavored to fulfill any of the terms and conditions of said executory contract to wit; weekly sums of \$100.00 per week, until balance is paid, and payment of rent and utility service and other services furnished to said premises.

3. That said Turn Over Order took cognizance of the \$475.00 brokerage paid by C. N. Golden, to sell said property but did not consider the \$2,852.27, spent by C. N. Golden to preserve the Bankrupt's Assets and to effect a sale of the business without a loss.

4. The valuation placed upon the furniture, fixtures and equipment by the Court was based upon the sale of said property by C. N. Golden after the adjudication of the above-named Bankrupt; said valuation did not take into account that the sale was not only of the furniture, fixtures and equipment of said premise but of the lease held by C. N. Golden on the premises in which said personal property was located and the good will of said business; to date said trustee has not elected to assume said lease nor to pay for the storage of said personal property located on the leased premises in question; that the value of said lease and goodwill of the business was not determined by the Court.

5. That the Turn Over Order does not consider the type of resale made by C. N. Golden; that said resale made by C. N. Golden after the adjudication of Angelo Pagliaro, the above-named bankrupt, was not for cash but under an executory contract of sale extending over a period of three or four years; that said trustee has not elected to confirm this sale or to assume from C. N. Golden the obligations which go with this contract nor to ask C. N. Golden of the nature of said sale; that C. N. Golden may

never collect the sales price of \$4,750.00 from the buyer.

/s/ C. N. GOLDEN,
Petitioner.

MORAN AND MILLSPAUGH,
By /s/ PHILLIP M. MILLSPAUGH,
Attorneys for Petitioner.

United States of America,
Northern District of California,
County of Alameda—ss.

I, C. N. Golden, the petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 11th day of April, 1951.

[Seal] /s/ P. M. MILLSPAUGH, JR.,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 16, 1951, Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW

The undersigned, one of the Referees in Bankruptcy, in accordance with Section 39(a) (8), of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

On September 5, 1950, Angelo Pagliaro, who was then operating a restaurant known as Skippy's Cafe at 1819 University Avenue, Berkeley, filed a Voluntary Petition in Bankruptcy and was on said Petition adjudged Bankrupt.

That thereafter and on the 13th day of September, 1950, I caused notices of the First Meeting of Creditors to be forwarded to all creditors scheduled by the Bankrupt, including C. N. Golden.

That thereafter at the First Meeting of Creditors held on the 25th day of September, 1950, John Costello was appointed Trustee of the estate of the Bankrupt above named and ever since has been and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

That on the 18th day of January, 1951, said Trustee filed with me a Petition for an Order requiring C. N. Golden to turn over to him for administration in these proceedings the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750.00)

in the event a certain Conditional Sales Contract, hereinafter referred to, was found to be invalid or the sum of One Thousand Seventy-Four Dollars (\$1,074.00) in the event said contract was found to be valid.

That in said Petition the Trustee alleged that at the time of the filing of the Petition in Bankruptcy, the Bankrupt was in possession of the furniture, fixtures and equipment of a restaurant at 1819 University Avenue, Berkeley, which property was being purchased by said Bankrupt from C. N. Golden and that subsequent to the filing of the Petition in Bankruptcy and in the month of October, 1950, the Bankrupt turned the property over to said C. N. Golden who thereafter sold the same for the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750.00), and that at the time the property was turned over by the Bankrupt to said C. N. Golden, there was only a balance due on the purchase price in the sum of Three Thousand Six Hundred Seventy-Six Dollars (\$3,676.00). The difference between the balance due C. N. Golden at the time of the filing of the Petition in Bankruptcy and the amount which Golden received on his subsequent resale of the property was the sum of One Thousand Seventy-Four Dollars (\$1,074.00) referred to in the Trustee's Prayer.

In response to the Order to Show Cause, C. N. Golden filed a paper denominated "Answer to Petition for Trustee for Turnover Order and Petition for Reclamation of Assets Held by Trustee."

In this Answer, C. N. Golden alleged that he was

the vendor of a Conditional Sales Contract dated July 7, 1950, covering the furniture, fixtures and equipment of the restaurant hereinabove referred to, the Bankrupt being the vendee. He further alleged that although sixty days had expired since the adjudication in bankruptcy, the Trustee had not elected to assume the contract. He further alleged in his Answer that he had not made any money from the sale of the personal property, and he asked that the Petition of the Trustee be dismissed. He then alleged the same facts with the additional fact that as part of the Conditional Sales Contract, he undertook to lease the premises to the Bankrupt; that the Trustee had not elected to assume the lease; that he had spent more than \$1,000.00 to preserve and maintain the "premises and/or personal property located at the same address" and that he has received no money from the Trustee for the preservation of the assets. That under the laws of California, he had the right to declare the contract at an end and to retain all payments as liquidated damages. He then prayed that the Trustee be required to turn over to him possession of the property. (This Answer was filed approximately two months after C. N. Golden had sold the property to a third party.)

The issues raised by the Trustee's Petition and the Answer of C. N. Golden came on at the hearing on January 30, 1951.

After hearing the evidence and considering authorities, I made an Order on the 6th day of

March, 1951, directing C. N. Golden to turn over to the Trustee the sum of Five Hundred Ninety-Nine Dollars (\$599.00), said sum being the reasonable value of the personal property as represented by the resale price thereof, less the balance due C. N. Golden under his Conditional Sales Contract and less the brokerage commission paid by C. N. Golden on the sale.

Thereafter C. N. Golden filed a Petition to Review said Order and after the Trustee filed a Motion to Dismiss the Petition for Review, said C. N. Golden filed an Amended Petition for Review, which Petition is still defective in that the Order complained of is not attached thereto.

II.

The Facts

There was introduced into evidence as Golden's Exhibit No. 1 the Conditional Sales Contract dated July 7, 1950, wherein Golden was the vendor and Pagliaro the purchaser. The contract price was Four Thousand Seven Hundred Seventy-Six Dollars (\$4,776.00), payable \$100.00 a week with a reservation of title in the seller until the full purchase price was paid. The contract contained the additional provision that upon completion of the purchase, the seller will arrange a transfer of lease to the buyer. It contained the standard provision that in case of default, the seller would have the right to declare the contract at an end and take immediate possession of the property, in which

event all payments made thereon would be retained by the seller as liquidated damages. The contract did not contain any provision that time was of the essence.

Golden testified that he received no payments from Pagliaro after September 5, 1950, the date of the filing of the Petition in Bankruptcy and that at that time, approximately \$3,600.00 was still due him on the contract; that the Bankrupt remained in possession of the property until October 21, 1950, on which date Golden obtained possession pursuant to a writing which was introduced as Golden's Exhibit No. 2 and reads as follows:

"Effective at 8:00 p.m. October 21st, 1950, the undersigned C. N. Golden and his wife Jessie P. Golden intend to repossess the premises known as Skippy's Cafe located at 1819 University Ave., County of Alameda, Berkeley, California. Said C. N. Golden and wife Jessie P. Golden do not assume any responsibility for debts contracted for by Angelo Pagliaro and his wife before the effective date of 8:00 p.m. Oct. 21, 1950, or after it. Said C. N. Golden and his wife Jessie P. Golden hereby release Angelo Pagliaro and his wife from all weekly installment payments due C. N. Golden and his wife Jessie P. Golden on the Cafe known as Skippy's Cafe, 1819 University Ave., County of Alameda, Berkeley, California.

"Angelo Pagliaro and his wife do not assume any responsibility for debts contracted for by C. N. Golden and his wife Jessie P. Golden, before or

after the effective date of this agreement, which is 8:00 p.m. October 21, 1950.

“Understood and Agreed to:

“C. N. GOLDEN,

“C. N. GOLDEN,

“JESSIE P. GOLDEN,

“JESSIE P. GOLDEN,

“ANGELO PAGLIARO,

“ANGELO PAGLIARO,

“MRS. ANGELO PAGLIARO.”

That after the repossession of the property, he operated the business for about thirty days and then he sold it to Virgil Miller for \$4,750.00, \$2,000.00 in cash and the balance in installments. That he first learned of the pendency of the bankruptcy proceedings when he received from the Court the Notice of the First Meeting of Creditors which was mailed by the Court on September 13, 1950; that there was no writing between him and the Bankrupt other than the Conditional Sales Contract hereinabove referred to. That the first communication that he had from the Trustee was a letter from the attorneys for the Trustee dated December 29, 1950, wherein the said attorneys requested to see a copy of the Conditional Sales Contract and requested him to advise them the balance due at the time he took back the restaurant and the amount received by him from a resale of the restaurant. That he held the restaurant premises under a lease from a Mr. McClellan which ran for three years with rentals of \$86.00 a month. That

Mr. Pagliaro was paying this rent in addition to the \$100.00 a week payment on the contracts. That Pagliaro paid the rent to him and he paid the owner. That when he sold the restaurant to Virgil Miller, he paid a brokerage fee of \$475.00 to Inter-City Realty Company. That during the month he was operating the restaurant, it operated at a loss.

The witness Golden did not have his records in Court, and by stipulation it was agreed that he could furnish the Court with a statement of monies expended by him in the preservation of the property. The only statement furnished is forwarded with this Certificate.

C. N. Golden did not apply for leave of this Court to either repossess or resell the property.

III.

Findings

The undersigned Referee, after considering the evidence and the applicable authorities, makes the following findings:

1. That at the time of the filing of the Petition in Bankruptcy, the Bankrupt was in possession of the furniture, fixtures and equipment of the restaurant located at 1819 University Avenue, Berkeley.

2. That said furniture, fixtures and equipment were being purchased by said Bankrupt from C. N. Golden under a Contract of Conditional Sale on which there was a balance due as of the date of the filing of the Petition in Bankruptcy of \$3,676.00.

3. That on the date of the filing of the Petition in Bankruptcy and at all times thereafter herein mentioned, said furniture, fixtures and equipment were worth the sum of \$4,750.00.

4. That on the 21st day of October, 1950, C. N. Golden took possession of said fixtures and equipment from the Bankrupt without leave of this Court and approximately thirty days later sold the same for \$4,750.00.

5. That in making said sale C. N. Golden was required to pay a brokerage fee of \$475.00, for which commission he is entitled to credit.

6. That it is impossible to tell from any evidence offered what, if any, monies were spent by C. N. Golden in preservation of the personal property.

7. That the Trustee is entitled to recover from C. N. Golden the difference between the balance due on the Conditional Sales Contract at the time of the filing of the Petition in Bankruptcy, \$3,676.00, and the \$4,750.00 received by C. N. Golden from the resale of the property, to wit, the sum of \$1,074.00, less the brokerage fee of \$475.00, leaving a net profit received by C. N. Golden from the resale of the property without leave of this Court, in the sum of \$599.00.

IV.

Discussion of Applicable Law

The vendor in a Conditional Sales Contract is

only a secured creditor and his interest is essentially in obtaining the price.

Thus the Court stated in *Walker vs. Houston*, 215 Cal. 742, 746:

“In our opinion, there is no doubt but that the title of the conditional seller is an ‘incident’ of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. It is true that the cases previously cited deal with liens. Nevertheless, the title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held.” (Underscoring ours.)

California courts have held that where time is not of the essence, the buyer may reacquire the property from the seller after repossession.

In *Liver vs. Mills*, 155 Cal. 459, 462, the Court stated:

“It has been held in this State, that where the Vendor, in case of a Conditional Sale, retakes possession pursuant to the terms of the Contract, the defaulting Vendee may still complete the pur-

chase and perfect his right to receive the property by paying the balance due. (Miller vs. Steen, 30 Cal. 407). This upon the theory that a mere delay in the payment of money is ordinarily 'capable of exact and entire compensation' and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment."

In this case, time was not made of the essence, so there would apparently be no objection to Bankrupt or to his Trustee paying the seller the price after a proper repossession. Yet, in this instance, the repossession was improper in that it occurred after the filing of the Petition. In such instance, a Petition for Reclamation is the proper method of repossession and no citation of authority is needed for the proposition that the Petition for Reclamation must be granted before the creditor may repossess the property. In all events, as the Petitioner cannot take advantage of his own wrong, the case may be viewed as if the Trustee possessed the property and the Petition for Reclamation had been filed. Under the cases cited above, the interest of the seller under a Conditional Sales Contract being in the price, it is proper that the Trustee may tender the balance due to the seller.

As the seller by his acts has sold the property and has thus obtained that which the Trustee would have tendered to him, it is proper that with a deduction for the expenses of the sale, the Petitioner must remit the excess over the balance due on the

contract to the Trustee. This, he was ordered to do in the Turn Over Order.

The provisions of Section 70(b) of the Bankruptcy Act requiring a Trustee to accept or reject executory contracts within sixty days of the adjudication, do not cover a Conditional Sales Contract and all that remains to be done is the payment by the vendee-bankrupt. Such a contract is not "an executory contract" within the meaning of that Section. In the case of *In Re San Francisco Bay Exposition* (43), 50 F. Supp. 334, Judge Goodman of the District Court for the Northern District of California states as follows:

"The Referee assumed that any contract not completely performed by either party is executory in the sense which gives rise to the right of disaffirmance. Upon that assumption he held that the Building and Loan Commissioner could disaffirm the subscription agreement, because even though the Exposition had performed, the Commissioner had not; ergo, the contract was executory and the Commissioner could disaffirm. In a literal sense, executory contracts are, of course, those wherein performance in whole or in part has not been had. Upon that general premise, without further distinction, the Referee bottomed his decision. In the sense used in both the California statute and the Bankruptcy Act, they (i.e., executory contracts), are the type of contracts which call for performance in futuro, such as leases, contracts for electric power, light, heat, delivery of commodities, service and the like."

Further reference may be made to 4 Collier on Bankruptcy, page 1228. The authorities state:

“The legislative intent back of Section 70(b) and the purpose of the provision is to solve the problem of [assumption of liabilities]. It is conceivable that a system of bankruptcy law might compel the non-bankrupt party to a contract, the performance of which is incomplete as to both contracting parties, to continue performing while for the counterpart refer him to a mere dividend out of the estate. Needless to say, such a solution is neither wise from the view point of commercial credit, nor fair from the viewpoint of equity. It neglects one of the basic principles of equity, mutuality of obligation and performance. What Section 70(b) actually proposes to do is precisely to secure this continued mutuality wherever it is felt to be of greater benefit to the estate to proceed in accordance with the bankrupt debtor’s plans rather than to freeze his commercial relations as of the filing date.”

From the Exposition case and the foregoing citation from Collier, we may conclude that not every contract which might be technically classified as executory is included within the language of Section 70(b). The Section was designed to protect persons contracting with the Bankrupt from increasing their damage or loss by rendering or holding themselves to render performance of a contract with no reasonable expectation of receiving the return performance to which they are entitled. In this situation, the Trustee must advise them they will receive all that they are entitled to but must them-

selves perform, or if the Trustee does not, the law states that they need not perform.

In the situation, however, where the party has already performed, and would not be further damaged, there is no reason for acceptance or rejection by the Trustee. In spite of the fact that the contract is technically executory in that the vendee or his trustee have not paid, this is not the sort of contract contemplated by Section 70(b).

The vendor in a Conditional Sales Contract has performed when he delivers possession to the buyer in the first instance. He need execute no conveyance or Bill of Sale upon receipt of the price. Payment or tender by the buyer vests title in himself. This is true whether the payment be voluntary or through legal proceedings. *Casady v. Fry* (1931) 115, C.A. Supp. 778.

V.

Papers Sent Up

The undersigned Referee is forwarding with this Certificate the following papers:

1. Trustee's Petition for Turnover Order.
2. Order to Show Cause.
3. Answer to Petition of Trustee and Petition for Reclamation of Assets.
- 3a. Answer to Petition for Reclamation of Assets.
4. Turnover Order.
5. Amended Petition for Review of Referee's Order.

6. Transcript of Proceedings on January 30, 1951.

7. Golden's Exhibit No. 1.

8. Statement filed by C. N. Golden.

Dated: May 23, 1951.

Respectfully submitted,

/s/ BERNARD J. ABROTT,

Referee in Bankruptcy.

[Endorsed]: Filed May 23, 1951. Referee.

[Endorsed]: Filed May 24, 1951. U.S.D.C.

[Title of District Court and Cause.]

OPINION AND ORDER

One Angelo Pagliaro unsuccessfully operated a restaurant in Berkeley, California. Upon filing a voluntary petition in Bankruptcy he was adjudged bankrupt.

At the time he filed his petition, the bankrupt possessed the furniture, fixtures and equipment of the restaurant which he was purchasing from C. N. Golden pursuant to the terms of a conditional sales contract.

Following the filing of the petition the bankrupt turned the property over to Golden who sold it, for Four Thousand Seven Hundred Fifty Dollars (\$4,750.00). At the time the property was given to Golden the balance due on the purchase price was

Three Thousand Six Hundred Seventy-Six Dollars (\$3,676.00), the difference between the balance due Golden at the time of the filing of the Petition and the amount which he obtained on the resale being the sum of One Thousand Seventy-four Dollars (\$1,074.00).

Golden's position is that although sixty (60) days elapsed since the adjudication in Bankruptcy, the trustee had not elected to assume the conditional sales contract. He further contends that he made no money from the sale of the personal property and seeks dismissal of trustee's petition. He further alleged in his answer that under the laws of California he had the right to declare the contract at an end and to retail all payments as liquidated damages.

The referee in Bankruptcy ordered Golden to turn over to the trustee the sum of Five Hundred Ninety-Nine Dollars (\$599.00), which he determined to be the reasonable value of the personal property, represented by its resale price, less the balance due Golden under the Conditional Sales Contract and less the brokerage commission paid by Golden on the sale.

The Conditional Sales Contract dated July 7, 1950, was introduced into evidence as Golden's Exhibit No. 1. Therein Golden is denominated the vendor, and the bankrupt Pagliaro is buyer or purchaser. The contract called for the payment of Four Thousand Seven Hundred and Seventy-six Dollars (\$4,776.00), payable at One Hundred Dollars (\$100.00), a week title to be reserved in the vendor

until payment was made in full, at which time the vendor would request a transfer of lease to the purchaser. The customary provision regarding immediate possession upon default and retention of all payments prior thereto as liquidated damages is also therein contained. There was no provision that time was of the essence.

Golden received no payments subsequent to September 5, 1950, the date of the filing of the Petition in Bankruptcy. Approximately Three Thousand Six Hundred Dollars (\$3,600.00) was still due and owing as of that date. The bankrupt continued in possession of the property until October 21, 1950, at which time Golden repossessed the premises pursuant to an instrument in writing and operated the business for about thirty (30) days at the end of which he sold the business to one Miller for Four Thousand Seven Hundred Fifty Dollars (\$4,750.00), Two Thousand Dollars (\$2,000.00) in cash, the balance to be paid in installments.

Golden contended before the referee that he first learned of the Bankruptcy proceedings upon receipt by him of the Notice of the First Meeting of Creditors which was mailed by the Court on September 13, 1950. He further urged that he held the restaurant premises under a lease from one McClellan which ran for three (3) years at a rental of Eighty-Six Dollars (\$86.00) per month, which the bankrupt had been paying in addition to the One Hundred Dollars (\$100.00) a week payment on the Conditional Sales Contract.

The referee made findings, in accordance with

the facts as set forth herein, the most pertinent of which is that the trustee is entitled to recover from Golden the difference between the balance due on the Conditional Sales Contract at the time of the filing of the petition, i.e., One Thousand Seventy-four Dollars (\$1,074.00), less a brokerage fee paid by Golden in the amount of Four Hundred Seventy-five Dollars (\$475.00), thus leaving a net profit to Golden out of the resale of the property without leave of Court in the amount of Five Hundred Ninety-nine Dollars (\$599.00).

The findings are based upon the principle that a seller in a Conditional Sales Contract is nothing more than a secured creditor whose interest is essentially in obtaining the price. As stated in *Walker v. Houston*, 215 Cal. 742, 746: "There is no doubt but that the title of the conditional seller is an 'incident' of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. * * * The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further consent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose * * *"

In California a conditional sales contract of the kind here dealt with is valid without recording. Upon the buyer's default the vendor may at his option repossess the goods and retain all prior paid installments on the purchase price. Consent by the

conditional vendee to the retaking of possession by the vendor upon default is implied in the very form of the contract itself (*Goldberg v. List*, 11 C2d 389 at 393). Repossession alone, however, does not necessarily terminate the contract and if there is no agreement to the contrary, nor unreasonable delay, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. "This upon the theory that a mere delay in the payment of money is ordinarily 'capable of exact and entire compensation,' and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment" (*Liver v. Mills*, 155 Cal. 459). In the immediate case nearly two months elapsed between initial default and repossession. Another month passed before the conditional seller in possession elected to sell the property. Even without the written agreement purporting to terminate the contract, it is clear that as between the buyer and seller the seller acted reasonably under the circumstances and if the conditional buyer were before this Court he would have no claim to the proceeds of the resale.

We are not directly concerned, however, with an evaluation of the rights of the parties to the original contract, but rather with the question as to whether the conditional seller was justified in extracting the property from the custody of the bankruptcy Court

without its assent and whether he may retain the proceeds from resale. The general rule that upon the filing of the petition the right, title, ownership and possession of the bankrupt as to his non-exempt property passes to the bankruptcy Court applies with equal force to the subject matter of a conditional sales contract. The contract is unaffected by the bankruptcy of the vendee and the vendor may reclaim the property unless the trustee elects to continue the contract within sixty (60) days provided by Section 70 b of the Bankruptcy Act. But the conditional vendor may not, after the petition in bankruptcy is filed, take the property from the bankrupt without the permission of the bankruptcy Court or through a reclamation proceeding. (See Matter of E. L. Trask & Co., Inc., [Ref., Mass.] 18 Am. B. R. [N.S.] 736; *In re Smith*, 18 F. 2d 797; Collier on Bankruptcy, 14th ed., § 70a [51]). Beneficial ownership and the right to acquire legal title may be of considerable value, and the trustee cannot be deprived of such "assets" by the unauthorized act of the conditional seller. It follows then that Golden, the conditional seller, had no right, either alone or pursuant to the meaningless consent of the bankrupt, to violate the custodia legis and repossess himself of the property here in issue. His conduct amounted to a technical conversion of the property. The trustee could have brought an action to recover possession or, in the event of resale, could have claimed the proceeds; but from September 5, 1950, to December 29, 1950, he did nothing, and the payments remained in default.

Section 70-b reads in material part as follows: “Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Provided, However, That the Court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not the trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which if any, have been rejected by the trustee * * *” (Emphasis added.) Applied to our problem, the section provides that although the trustee has the right to acquire title for the benefit of creditors, he is not obliged to. He may reject it as burdensome to the estate. Since the trustee did neither here, he seeks to avoid the force of the provision by arguing that this is not an executory contract within the contemplation of Section 70-b. He construes that section to apply only to instances where performance in future is owing on both sides. No authority was cited and none can be found which applies that restricted construction to the section. Collier, in his work on Bankruptcy, footnotes his statement that “the vendor may reclaim the property unless the trustee elects to complete the contract” to the appropriate paragraphs on executory contracts (14th ed., p. 1074 n. 31). Long before 70-b was promulgated the

right of a trustee to adopt or reject a conditional sales contract was recognized. (See *Bailey v. Baker Ice Mach. Co.*, 36 S. Ct. 50; *In re Wegman Piano Co.*, 221 F. 128; *Matter of Terrell*, 246 F. 743; *In re Burgermeister Brewing Co.*, 84 F. 2d 388; *In re White Plains Ice Service, Inc.*, 109 F. 2d 913; *In re Halferty*, 136 F. 2d 640; *Blakeley v. Hutchings*, 203 N.W. 86; 6 Am. Jur., p. 1133). The assumption of a contract entails the assumption of liabilities constituting expenses of administration and therefore a first charge upon the bankrupt's assets. It would be contrary to the spirit of the Act to force upon the creditors what might well be a white elephant, or, conversely, to permit a summary forfeiture of what might be a valuable right. On the other hand, it is consistent with the Act to invest the trustee with power to assume or reject the contract as he, in his judicious discretion, may deem most conducive to the prospective benefit of the estate. If, as happened here, sixty (60) days elapse without the trustee having made his election, the contract is deemed rejected, and the conditional seller may reclaim the property or, preferring to make the sale absolute, file a claim for the balance owing.

We thus are confronted, in this case, with the interesting spectacle of a trustee attempting to truncate his power of disaffirmance in order to force reimbursement. This he cannot do. Nor can he extend the time within which adoption may be made. Although the action of the conditional seller was irregular, it is the conclusion of this Court that

the trustee is barred from exploiting that technical wrong. He is conclusively presumed to have disaffirmed the contract and hence has no enforceable claim to the proceeds of resale.

The Order of the Referee is Reversed.

Dated July 23, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 23, 1951, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73-(b)

Notice Is Hereby Given that John Costello, Trustee of the estate of Angelo Pagliaro, Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order made and entered in the above-entitled proceeding by Hon. Edward P. Murphy, Judge of the above-entitled court on the 23rd day of July, 1951, wherein and whereby said court reversed the Order, Judgment and Decree relative to Conditional Sales Contract by the Bankrupt and C. N. Golden, made and entered on March 6, 1951, in the above-entitled proceeding by Hon. Bernard J. Abrott, Referee in Bankruptcy, and from the whole of said Order of said District Judge so made and filed herein on the 23rd day of July, 1951.

Dated at San Francisco in the Northern District of California, this 6th day of August, 1951.

JOHN COSTELLO,

Trustee of the Estate of
Angelo Pagliaro,

By /s/ DANIEL R. COWANS,
One of His Attorneys.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a)

To the Above-Entitled Court and to C. W. Calbreath, Esq., Clerk Thereof, and to C. N. Golden and to Messrs. Moran & Millspaugh, His Attorney:

Comes now John Costello, Trustee of the estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 75(a) of the Federal Rules of Civil Procedure designate the following as the entire record, proceedings and evidence to be contained in the Record on Appeal. Notice of which said Appeal was heretofore filed herein on the 6th day of August, 1951, viz.:

1. Order Adjudicating Appellant Bankrupt.
2. Order Approving Trustee's Bond.
3. (Trustee's) Petition for Turnover Order together with Order to Show Cause thereon issued by Referee on January 18, 1951.

4. Answer of C. N. Golden to said last-mentioned Petition.

5. Answer of Trustee to Petition for Reclamation.

6. (Referee's) Turnover Order, dated March 6, 1951.

7. (Appellee's) Petition to Review Order of Referee and Amended Petition to Review Order of Referee.

8. Reporter's Transcript of Proceedings of January 30, 1951.

9. C. N. Golden's Exhibit No. 1.

10. Certificate and Report of Referee relative to Petition for Review of Referee's Order, dated May 23, 1951.

11. Opinion and Order of District Judge, dated July 23, 1951, Reversing Referee's Order of March 6, 1951.

12. (Appellant's) Notice of Appeal, dated August 6, 1951.

13. This Designation of Contents of Record on Appeal.

Dated this 22nd day of August, 1951.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By /s/ DANIEL R. COWANS,

Attorneys for Appellant, John Costello, Trustee of
the Estate of Angelo Pagliaro, Bankrupt.

[Endorsed]: Filed August 22, 1951.

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 39166

In the Matter of
ANGELO PAGLIARO,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Oakland, California, January 30, 1951—10:00 A.M.

Before: Honorable Bernard J. Abrott,
Referee in Bankruptcy.

Appearances:

SHAPRO & ROTHSCHILD, by
AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

MORAN and MILLSPAUGH, by
PHILLIP M. MILLSPAUGH,
Attorneys for C. N. Golden.

HARRY GONICK,
Attorney for Bankrupt.

The Referee: Angelo Pagliaro. Petition in reclamation by the trustee and also petition in reclamation by the respondent, C. N. Golden, is that correct, gentlemen?

Mr. Millspaugh: That's correct, your Honor.

The Referee: Mr. Millspaugh represents Mr. Golden.

Mr. Millspaugh: That's correct.

The Referee: Mr. Rothschild represents the trustee and I see also present in court the attorney for the bankrupt.

Mr. Gonick: Yes, that's right.

The Referee: Although not a party to this proceeding.

Mr. Gonick: No. It was continued to today and that's why I am here.

The Referee: Very well.

Mr. Rothschild: Mr. Golden?

C. N. GOLDEN

called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

By The Referee:

Q. What is your full name?

A. Clifford N. Golden.

Q. Clifford N. Golden, G-o-l-d-e-n?

A. That's right.

Direct Examination

By Mr. Rothschild: [1*]

Q. Mr. Golden, did you sell certain restaurant fixtures and equipment to Angelo Pagliaro, the bankrupt?

A. I did.

Q. And was that pursuant to a written contract?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of C. N. Golden.)

A. That's right.

Q. Have you that written contract?

A. Uh-huh.

Q. May I see it, please?

(The witness handed the paper to the trustee.)

Q. Now, the witness has handed me a paper denominated conditional sales contract, where C. N. Golden is described as the seller, Angelo Pagliaro as the buyer, bearing the date July 7, 1950, and recorded with the County Recorder of this county on July 12, 1950, Book 6161 Official Records, page 267. Now, on September 5, 1950, the property described in the conditional sales contract was located in the restaurant operated by Mr. Pagliaro?

A. On December 5th?

Q. September 5th.

A. No—I don't understand.

Mr. Rothschild: Will you read the question?

(The last question was read by the Reporter.)

A. Uh-huh.

The Referee: What is the answer?

The Witness: Yes, sir.

Q. And what was the balance due under the conditional sales contract at that time?

A. I believe it was Thirty-six Hundred. I had my book with me but laid it down and went off and forgot it. [2]

Q. Did you receive any payments from Mr. Pagliaro after September 5, 1950? A. No.

(Testimony of C. N. Golden.)

Q. Did you subsequently obtain possession of this property described in the conditional sales contract? A. Uh-huh.

Q. You have to answer so she can get it.

A. Yes, sir.

Q. And when did you get possession?

A. I believe it was November—about November 1st.

Q. And have you now possession of that property?

A. Pardon me, let me correct that answer. November 1st, that was September 1st, we discussed that. We operated one month and then sold it December 1st.

Q. Now, let's get this straight. You told me on September 5th Mr. Pagliaro had possession.

A. December 5th.

Q. September 5th.

Mr. Millspaugh: Refresh your memory here.

A. I believe that's right. I don't just remember the date, you see.

Q. Well, if counsel knows the date, I'll take counsel's date.

Mr. Millspaugh: No, I don't know the date either; there is a notice of intention to perhaps here.

The Referee: Off the record, gentlemen. Mr. Golden, is that Mrs. Golden sitting there?

The Witness: Yes.

The Referee: She said that she believes October

(Testimony of C. N. Golden.)

23rd [3] was the date that you repossessed it, is that correct, Mr. Golden?

The Witness: She would know better than I would because she kept all the books.

The Referee: Are you willing to accept the statement that October 23rd was the date?

The Witness: That's right.

The Referee: Counsel, you have no objection——

Mr. Millspaugh: I have no objection to that.

Q. And what did you do with this property after you took possession on October 23rd?

A. We operated it thirty days.

Q. That's to about November 23rd then?

A. No, we operated until about November 25th, I believe, or 26th. I'm the poorest hand at remembering dates.

Q. And then what happened to the property?

A. I sold it.

Q. To whom?

A. Mr. Miller. I don't just remember his——

Mrs. Golden: Virgil Miller.

The Witness: Virgil Miller.

Q. For how much? A. Forty-seven Fifty.

Q. On contract?

A. Well, no, I got some down.

Q. How much? A. Two Thousand.

Q. Two Thousand Dollars down. When did you first learn [4] that Mr. Pagliaro had filed a petition in bankruptcy?

A. We got a notice from the bankruptcy court. I don't just remember what day it was.

(Testimony of C. N. Golden.)

Q. That's the printed first meeting notice?

A. Huh?

Q. That's the printed notice of the Court of the first meeting of creditors? A. I believe so.

Mr. Rothschild: That's all.

The Referee: Mr. Millspaugh?

Mr. Millspaugh: Unfortunately, Mr. Golden's books are at my office and——

The Referee: Well, as far as the Court is concerned, I would be willing to give you additional time to bring any records you want. I mean, if you prefer to have the matter continued.

Mr. Millspaugh: If it goes into a matter—I don't think we have to go into continuances because I think it is a matter of—although the trustee has no right in this money. We could bring the books back to show where Mr. Golden has spent money to maintain this place and to keep it up during the time that he had to repossess it.

The Referee: Counsel, what the Court wants to know is whether or not you are going to try the case piece-meal or submit it or are you going to take two chances?

Mr. Millspaugh: I suppose we don't have much choice. [5] We'll have to continue it until we get the books.

The Referee: You can still avail yourself of the examination of anyone else you want here.

Mr. Millspaugh: The books are the main thing. It's a question of the money that was spent to preserve the property. Mr. Golden didn't have——

(Testimony of C. N. Golden.)

The Witness: I couldn't remember it now. Could you remember that, Mother? She kept all the books. She might remember. Could you?

Mrs. Golden: Well, I know it was between Five Hundred Dollars and a Thousand Dollars but I can't remember.

Mr. Millspaugh: You would have to remember each itemized bill, I imagine, wouldn't you?

Mrs. Golden: No, I can't.

Mr. Millspaugh: I'll start out here.

Cross-Examination

By Mr. Millspaugh:

Q. Is this your signature on this conditional sales contract? A. Uh-huh, that's right.

Q. Is that the signature of Mr. Pagliaro (indicating)? A. That's right.

Q. Did you see him sign there? A. I did.

Q. All right if I introduce this?

Mr. Rothschild: Go ahead.

Mr. Millspaugh: I wish to introduce this in evidence, your Honor. [6]

The Referee: Very well. Exhibit No. 1 in evidence.

(The paper referred to was received by the Referee and marked "Respondent's Exhibit No. 1 in Evidence.")

(Testimony of C. N. Golden.)

C. N. GOLDEN'S EXHIBIT No. 1

Book 6161 Page 269

AE60494

Conditional Sales Contract

Agreement made this 7th day of July, 1950, by and between C. N. Golden of Berkeley, California, party of the first part, hereinafter referred to as the seller, and Angelo Pagliaro of Berkeley, California, party of the second part, hereinafter referred to as the purchaser,

Witnesseth:

First. That the seller is the owner of the existing lease upon those certain store premises at 1819 University Avenue, Berkeley, California, formerly known as Dettmer's Coffee Shop, and seller is also the owner of the name and good will and the inventory hereinafter set forth of the business formerly operated in said premises.

Second. That the seller sells to said buyer the following described property, to wit:

The name, "Dettmer's Coffee Shop," the good will, and the following described personal property:

- 1 Horseshoe Counter
- 18 Stools
- 1 Cash Register (National)
- 2 Pie Cases
- 1 Center Bar
- 2 Exhaust Fans

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

- 2 Hat Racks
- 1 Electric Water Cooler
- 1 Electric Clock
- 1 Meat Block
- 1 Range
- 1 Range Hood—7 Vent Pipes
- 1 Refrigerator (20-foot)
- 1 Steam Table
- 8 Steam Table Insets (stainless steel)
- 8 “ “ lids
- 1 “ pan
- 1 Double Sink
- 1 Grease Trap
- 1 Scrap Table
- 1 Work Table
- 2 Flour Cans
- 1 Flour Barrel
- 6 Stone Jars
- 1 Meat Grinder
- 1 Venetian Blind
- 1 Scale
- 1 Scrub Bucket and Mop
- 3 Garbage Cans
- 48 Grill Plates
- 46 Dinner Plates
- 30 12" Platters
- 42 5" Plates
- 40 4" Plates
- 35 Dessert Dishes
- 45 Cups

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

- 35 Saucers
- 60 Butter Chips
- 35 Creamers
- 4 Cream Pitchers
- 83 Forks (stainless steel)
- 78 Knives (stainless steel)
- 52 Soup Spoons (stainless steel)
- 76 Teaspoons (stainless steel)
- 4 Vinegar and Oil Bottles
- 60 Water Glasses
- 8 Juice Glasses
- 6 Syrup Pitchers
- 6 Egg Cups
- 30 Soup Plates
- 6 Napkin Holders
- 12 Salt and Pepper Shakers
- 6 Sugar Bowls
- 6 Station Brackets
- 1 10-gallon Stock Bottle
- 1 5-gallon “
- 2 6-quart Sauce Pan
- 3 4-quart “
- 1 China lap. 1 Copper Funnel
- 2 4-gallon Bottles
- 1 Dish pan (stainless steel)
- 3 Roasting pans
- 4 Dippers
- 1 Skimmer
- 9 Large Spoons
- 2 Whips

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

- 3 Enameled pans (oblong)
- 7 Frying pans (assorted sizes)
- 9 Granite pans “
- 1 French-fry Pvt.
- 1 Potato Masher

In addition, upon completion of this purchase, the seller will arrange a transfer of the lease upon said premises to the buyer. The consideration of this sale is the sum of \$4,776.00, to be paid by the buyer, \$100.00 or more on Monday of each week beginning July 10, 1950.

Third. That said buyer shall and will pay for said property the said sum of money at the time and in the manner above mentioned at Berkeley, California.

Fourth. That the title to said property and right of possession thereto shall be and remain in said seller until said sum of \$4,776.00 shall be paid in full, although the conditional buyer shall also have the right of possession as long as he shall continue making the payments hereinabove provided for. In addition, the buyer shall pay all rent and utility service, and other services furnished to said premises.

Fifth. That in case of default in any of the payments when due, as above specified, the seller shall thereupon forthwith have the right to declare this contract at an end, and to take immediate possession of said above described property, and in such case the said property, as well as all payments which

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

shall have been made hereon, shall belong to and be retained by said seller as liquidated damages for nonperformance of this contract on the part of said buyer, and for use of and injury to said property.

Sixth. That said buyer shall not sell, transfer or dispose of the above-described property without the written consent of the seller.

In the event of any legal action upon this contract by the seller, the buyer will pay all expenses of the seller, including attorney's fees and Court costs.

In Witness Whereof, the parties hereto have executed this agreement in duplicate the day and the year first above written.

/s/ C. N. GOLDEN,

Party of the First Part.

/s/ ANGELO PAGLIARO,

Party of the Second Part.

State of California,
County of Alameda—ss.

On this 7th day of July, 1950, before me, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared C. N. Golden, known to me to be the person that executed the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal] /s/ ARTHUR BELLMAN,
Notary Public in and for the County of Alameda,
State of California.

[Stamped]: Recorded at request of R. A. Bellman, July 12, 1950, book 6161, page 269, Official Records of Alameda County, California.

Received January 30, 1951.

Q. At the time you entered into this contract, did you know whether or not the bankrupt, Mr. Pagliaro, was insolvent? A. No, I didn't.

Q. Did you have any thought at all to consider him insolvent? A. No, I didn't.

Q. At the time you entered into this contract, did you also enter into a contract or lease concerning certain restaurant and——

A. No, the lease went with the place.

Q. The lease went with the place. It went with this conditional sales contract.

A. That's right.

Q. Isn't that correct?

Mr. Rothschild: Counsel, may I interrupt there. He said no; then he said the lease went with him. Let's straighten it out.

Mr. Millspaugh: I think one of the clauses in there——

(Testimony of C. N. Golden.)

Mr. Rothschild: There is a reference in your contract to an assignment of a lease.

The Witness: Well, the lease went with the restaurant after it was paid for. It was to be transferred.

The Referee: Mr. Golden, other than this written document that has just been received in evidence, did [7] you sign any other written instrument with Mr. Pagliaro with reference to that?

The Witness: No, sir.

The Referee: None at all?

The Witness: No, sir.

The Referee: Did you sign a note?

The Witness: No, sir.

The Referee: Just this document?

The Witness: Just that contract.

The Referee: And you say your understanding was that after the payments were made on the equipment that then you were to enter into a written lease with Mr. Pagliaro, is that your answer?

The Witness: That's right, yes, sir.

The Referee: Pardon me, counsel.

Q. Is that correct, Mr. Pagliaro, that you advanced several payments on account of the rent on the premises? A. Yes, sir.

Mr. Rothschild: Just a second, I am going to object to that as incompetent, irrelevant and immaterial and not within the issues here.

Mr. Millspaugh: There is a question of—the basic question here is whether or not the witness here received anything of value from Mr. Golden.

(Testimony of C. N. Golden.)

In other words, consideration for consideration.

Mr. Rothschild: I'll concede right now that [8] I've seen the conditional sales contract. I'll concede that there was a valid conditional sales contract.

Mr. Millspaugh: All right.

Mr. Rothschild: On which, according to this witness' testimony there was \$3600 due at the date of the filing of the petition in bankruptcy, that thereafter, subsequent to the filing of the petition in bankruptcy and without leave of this Court, this witness took possession of the property subject to the conditional sales contract and resold it for \$4750. Now, those are the admitted facts, aren't they?

Mr. Millspaugh: Those are not all the facts.

Q. Mr. Golden, did you send a notice of default to Mr. Pagliaro concerning this conditional sales contract? A. That's right.

Q. Is this the notice that you sent to Mr. Pagliaro? A. That's right.

Q. Is that your signature there (indicating)?

A. That's right.

Q. Signature of your wife?

A. That's right.

Q. Is this the signature of Mr. Pagliaro?

A. That's right.

Q. Mrs. Pagliaro? A. That's right.

Mr. Millspaugh: I would like to introduce this in evidence, your Honor.

Mr. Rothschild: To the introduction of which document [9] the trustee objects on the ground it's

(Testimony of C. N. Golden.)

incompetent, irrelevant and immaterial, appearing on its face that it bears a date some month and a half after the filing of the petition in bankruptcy. It is a notice to the bankrupt and not to the trustee in bankruptcy.

The Referee: Objection overruled.

(The paper referred to was received by the Referee and marked "Respondent's Exhibit No. 2.")

The Referee: Off the record.

(Discussion off the record.)

Q. Mr. Golden, did you ever receive a notice from the trustee that he wants to assume the conditional sales contract, together with——

A. No, I didn't.

Q. None whatsoever. A. Not a bit.

Q. Did he ever tell you that he did desire to keep the contract, make payments to the lessor of the demised premises?

A. Well, we have had several talks but come to no agreement at all about him going ahead and keeping it. He just told me he couldn't pay for it——

Q. I mean the trustee in bankruptcy has told you he was going to go ahead and make payments on the rent on the premises there?

A. No; I'm sorry, I thought you meant Mr. Pagliaro. No, I never received anything from this but the one letter that someone wrote me to send in the contract and deal that we made on it which

(Testimony of C. N. Golden.)

we did. That's all we have ever heard from [10] them.

Mr. Rothschild: That's a letter from me, is that correct?

The Witness: Well, I guess it was.

Q. Do you have a copy of that letter?

The Referee: And when you say "that," Mr. Millspaugh, that is in addition to the notice of the bankruptcy proceeding that you received. You also received a notice from this court?

The Witness: That's right.

The Referee: Notifying you that Angelo Pagliaro had filed a petition in bankruptcy.

The Witness: Yes, sir. I can say this much. A man can get in lots of trouble trying to help somebody unbeknownst it to him. I only did that for him, just to help him.

Mr. Millspaugh: Here is a copy of the letter that was sent to you on December 29, 1950, Mr. C. L. Golden, Dear Mr. Golden——

The Witness: Oh, yes, that's right.

Mr. Millspaugh: Does the Court have a copy of this?

The Referee: No, I have never seen it counsel.

Mr. Millspaugh: I would like to put that in evidence to show that——

(Mr. Millspaugh handed the paper to the Referee.)

The Referee: Letter dated December 29, 1950, addressed to Mr. C. L. Golden, 1700 San Pablo

(Testimony of C. N. Golden.)

Avenue, [11] Berkeley, California, signed, very truly yours, August B. Rothschild, for Shapro & Rothschild, copy of a letter—Exhibit 3.

(The paper referred to was received by the Referee and marked "Respondent's Exhibit No. 3.")

Q. Mr. Golden, did you have a lease on the premises in question—restaurant there?

A. Yes.

Q. Who was the lessor—the party that leased it to you? A. What's that guy's name?

Mrs. Golden: McLellan.

A. Yes, McLellan.

Q. And what type of lease did you have? How long was it? A. Three years.

Q. And what were the payments to be made under that lease?

A. Eighty dollars a month.

Q. Eighty dollars a month. Did the bankrupt, Mr. Pagliaro, promise to make those payments when he went into possession of the restaurant?

A. That's right.

Mr. Rothschild: Just wait a second. I object on the ground that the contract itself is the best evidence.

Mr. Millspaugh: That is with reference to the third-party here.

Mr. Rothschild: No, but you asked what the bankrupt agreed to do.

The Referee: Read the question, please.

(Testimony of C. N. Golden.)

(The last question was read by the [12] Reporter.)

Q. Who was paying the rent?

The Referee: Just a minute, counsel. The record will be up in the air. Do you withdraw that question?

Mr. Millspaugh: I'll withdraw that question.

The Referee: Very well.

Q. Who was paying the rental at the time Mr. Pagliaro went into possession?

A. He was. Mr. Pagliaro is what I mean now when I said he.

The Referee: What is that, Mr. Golden?

The Witness: Mr. Pagliaro is who I mean when I said he.

Q. Did that money that was paid to the lessor come out of the Hundred Dollars which was paid to you every week?

A. No. He was to pay me a Hundred Dollars a week and then pay the rent on top of it.

Q. I see.

The Referee: Let me interrupt a minute, counsel.

Q. (By The Referee): Did Mr. Pagliaro, when he would make the payments, did he give you a Hundred Dollars himself and then would he also give you Eighty Dollars rent and then you, in turn, paid the owner of the property?

A. That's right.

(Testimony of C. N. Golden.)

Q. Mr. Pagliaro didn't pay the owner of the property direct? A. No, sir.

Q. (By Mr. Millspaugh): After Mr. Pagliaro was adjudicated a bankrupt on or [13] about September 5th, to your knowledge did Mr. Pagliaro make any more payments on the lease in question?

A. No, he didn't.

Q. Did you make any payments on the lease?

A. Yes.

Q. Have you made those payments to date?

A. To date, until I sold it. You know about it—until I sold it.

Q. The present buyer is continuing to make the payments. A. That's right.

Q. If you hadn't made those payments on the lease, would you have forfeited your rights on the lease? A. That's right.

Q. Did you make any payments on the lease yourself during the time that Mr. Pagliaro was in possession of the premises?

A. Paid the first month.

Q. And how much was the first month?

A. Eighty Dollars, and then I paid the last month that he was there. He didn't pay the rent and——

Q. That was about approximately how much?

A. Eighty Dollars.

Q. Did you make advances to Mr. Pagliaro during the time he was in possession for the purchase of food or equipment?

(Testimony of C. N. Golden.)

A. I stood for it and then paid later after he was gone.

Q. Approximately how much did you advance to him for the purchase of food?

A. Altogether? [14]

Q. For the purchase of food.

A. Eighty Dollars at one place.

Q. Approximately how much did you spend on light fixtures to improve the place?

A. One Hundred Fifty Dollars on lights, Thirty-six Dollars on electricity, watt being a 210.

Q. Did you advance any other money for improvement of his restaurant while Mr. Pagliaro was in possession?

A. Yes, I believe there was \$150 to Peter Wilson for equipment.

Q. That equipment went into the leased premises, is that right? A. That's right.

Q. Is there anything else that you spent to improve the premises?

A. Well, I tell you, it's hard for me to remember. I had it all in that book. I did fix the floor——

The Referee: Just a minute, counsel. Counsel, as far as the Court is concerned, even if your theory is correct, it would appear to me that I'll have to know something about when this money was spent. We have a date of cleavage here, September 5th, when the petition in bankruptcy was filed.

Mr. Millspaugh: Yes, sir.

The Referee: And it's entirely possible that some of these monies that Mr. Golden is speaking

(Testimony of C. N. Golden.)

about that he spent were spent after bankruptcy. For instance, he [15] said he paid the last month's rent. As I recall, Mr. Pagliaro, when he was examined here at the first meeting of creditors, he was still operating the restaurant unbeknownst to the Court or anyone else. We have different matters to consider here and as long as he does have—You have books, do you not?

The Witness: Oh, yes, and bills. I had it all and we left it laying in his office.

Mr. Millspaugh: Suppose we continue it over then.

The Referee: Off the record.

(Discussion off the record.)

Mr. Millspaugh: There is one other question here, too. He spent——

Q. When you sold these premises for the second time, you paid a broker's fee, is that not correct, for the sale of the property?

A. Four Hundred and Seventy-five Dollars.

Q. Four Hundred and Seventy-five Dollars.

The Referee: Mr. Rothschild, if Mr. Golden has to return with his books, did you want to be able to cross-examine up until then?

Mr. Rothschild: Well, I would just as leave ask a couple of questions now and possibly, if counsel gives me a statement showing the amounts and dates over counsel's signature, I'll accept them if counsel will vouch for them.

Mr. Millspaugh: All right, fine. [16]

Q. (By Mr. Rothschild): Just this one ques-

(Testimony of C. N. Golden.)

tion: This \$475, did that come out of the Forty-seven Fifty or was that on top of it?

A. I didn't understand.

Q. Was the \$475 deducted from the \$4750?

A. That's right, as a commission for the real estate man.

Q. And who was the real estate man?

A. Claudenos. I may have one of his cards. Here you are—C-l-a-u-d-e-n-o-s of the Inter-City Realty Company.

Q. Now, Mr. Golden, when you took over on or about October 23rd, was there any foodstuffs on hand?

A. Well, some, but very little.

Q. Did you pay for those or just take them?

A. Well, we just let them go back—I didn't pay for nothing.

Q. And during the period that you operated the restaurant did you operate it at a profit or at a loss?

A. On a loss. Even if I would count my wages or my wife's wages or anything, I would lose plenty because we didn't count our wages. We didn't break even on what we were actually doing.

Mr. Rothschild: I would suggest then that the matter stand over and if I get a statement in a proper form—I am reserving all questions as to admissibility of the statement. I want a statement first instead of bringing Mr. Golden back.

Mr. Millspaugh: There is no reason why we can't go [17] into the law now and argue it here.

(Testimony of C. N. Golden.)

I would like to argue it now and save ourselves some time, I think.

The Witness: I would like to get it over with if you allow me to say anything because I unfortunately got into this thing, good gracious, trying to help someone—didn't know anything about it either.

The Referee: You won't have to return, Mr. Golden; you can step down.

The Witness: Thank you.

The Referee: The matter is submitted. Counsel, do you want to argue it now?

Mr. Rothschild: It's agreeable to me, your Honor.

The Referee: And it's stipulated by counsel on both sides, in lieu of bringing Mr. Golden back, that counsel for Mr. Golden will examine the books and records and furnish Mr. Rothschild with a statement as to what the books and records show. Is that satisfactory?

Mr. Rothschild: That's right, and that I reserve all rights as to the admissibility of the——

Mr. Millspaugh: That's correct.

The Referee: But no one is making any objections to Mr. Golden not being here and testifying as to what those records show.

Mr. Rothschild: That's right.

The Referee: We have a peculiar situation, gentlemen, [18] here. You are both petitioners, so as far as Mr. Rothschild is concerned, you are the original petitioner.

Mr. Rothschild: I think the trustee's petition is

very clear, that on September 5, 1950, John Costello became the owner of certain restaurant fixtures and equipment subject to conditional sales contract, that thereafter, one C. N. Golden, with full knowledge of the pendency of the bankruptcy proceeding without the consent of this Court, converted the trustee's equity in the fixtures and according to our petition which gives him the break, he said on the stand \$3600, and our petition, using the figure that he gave me in a letter of \$3676, that he took that property and thereafter sold it and converted it to his own use, a profit of \$1074, which was presumably the amount the trustee would have received from the sale of the property, had not this court been ignored. And that's solely and simply our position, that nothing has anything to do with rent, unsecured debts or other accounting between the parties has any materiality, that the sole question, is the amount due on this conditional sales contract. This wasn't a chattel mortgage given as security for miscellaneous indebtedness, but was merely security for the purchase price. While my prayer is in the alternative, I am waiving that part of [19] the prayer which asks \$4750 and stand solely on \$1074.

The Referee: Counsel?

Mr. Millspaugh: Finished? Well, in the first place, I think it is conceded this was a conditional sales contract. Now, let's take the position where a man—first of all, before a man is adjudicated a bankrupt, there is no question there that under conditional sales contract, you can forfeit buyer's

rights thereunder, there not being preference under Section 60 of the Bankruptcy Act. Now, it comes down to a point where a man has been adjudicated a bankrupt and he does the same thing. All right, there are two things that happen in that respect. As you said before, the trustee takes over the property. Now, the trustee just can't let that property sit there and not do anything about it. It costs money to keep property sitting around under the Bankruptcy Act. The trustee has to act himself, and under Subdivision B of Section 70 of the Bankruptcy Act, reads "within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property." I think the theory here with the trustee to Mr. Golden will show that he had full knowledge of an executory contract or that sixty days has elapsed since then, no notice of this contract has been given to the trustee and under those grounds the [20] trustee cannot come in here now months later and say, well, we want the money back from the property here. Actually, Mr. Golden made no profit on it at all; he spent money to preserve the asset and it cost him money to keep it going during the time the man went bankrupt. He sold the property, he received a small down payment on it and the rest of the money would be paid off in the future. Even though the trustee has title to the property, Mr. Golden has a right to declare a forfeiture of the actual trustee. That right is the right of the contract he entered into originally with the bankrupt. That right is protected up to the time

of the adjudication. It's protected after the sixty-day period, too. In this case here, Mr. Golden didn't deliberately sell the property; it is one of these cases where he didn't have knowledge of the bankruptcy laws. What else could he do actually? He had no choice but turn around and sell it. If he didn't sell it, the property would be lying there now and he would be liable. He would have been worse off now than he is actually. Actually, he did the only thing he could do—sell the property and try and cut his loss down as low as possible. He has really lost money on the deal; he hasn't made money on the deal. Now, it is my understanding that this Thousand Dollars that Mr. Rothschild is talking about here is the Thousand Dollars [21] that he made prior to the time he received under bankruptcy, is that correct?

Mr. Rothschild: No, this \$1074 is the difference between \$3676——

Mr. Millspaugh: \$3676?

Mr. Rothschild: Which Mr. Golden advised me on the stand—he said \$3600 in his letter to me—that \$3676 was due him from the conditional sales contract—due him under the conditional sales contract and \$1074 is the difference between that sum and the sum which Mr. Golden received from the sale of the trustee's property.

Mr. Millspaugh: You are forgetting the brokerage fee too in there; that's about \$500.

Mr. Rothschild: The trustee in bankruptcy could have sold that property in court; we don't make brokerage fees.

Mr. Millspaugh: According to the law here, you let sixty days elapse. What you should have done was gone ahead and sold the property, give him notice that you were going to continue on it. You can't expect Mr. Golden to go ahead here and pay the lease on the property and pay all the bills on it while you sit back and do nothing and that's exactly the reason why this subdivision was put in there. Mr. Golden had no choice in the matter. He has made no money on the [22] transaction at all. He has a right to declare the contract at an end when he has done that. This petition of mine here is to allow him to reclaim his asset from the trustee. If the trustee has any title whatsoever, I think it should be returned back to Mr. Golden.

The Referee: When did Mr. Golden sell the property—'47?

Mr. Millspaugh: About November something—November 25th, the man was adjudicated a bankrupt—September 5th—more than sixty days.

The Referee: The trustee wasn't elected though on that date was he?

Mr. Millspaugh: It says here within sixty days after the adjudication, quoting from Subdivision B of Section 70 of the Bankruptcy Act. I don't think it has been changed.

The Referee: Anything further, gentlemen?

Mr. Rothschild: No, except this one statement I would like to make, your Honor. I think the trustee necessarily must concede liability for the reasonable storage value on the property. I think at the

time of the sale, because if the trustee had conducted a sale, he would have been responsible.

Mr. Millspaugh: I think it also must be conceded that these types of businesses are not easy to sell and [23] even if the trustee had to go ahead to have tried to have sold it, he would not have gotten that much money on it. He himself would have undoubtedly hired a broker and paid the usual percentage that is paid to a broker.

Mr. Golden: Another thing, I painted it, too, put a ventilator fan in.

Mr. Rothschild: Submitted.

Mr. Millspaugh: I submit it.

The Referee: Counsel, you send those statements to Mr. Rothschild.

Mr. Millspaugh: All right, fine.

The Referee: And also get from Mr. Golden the exact payments with reference to the chattel mortgage or conditional sales contract.

Mr. Millspaugh: You mean, made by the bankrupt?

The Referee: Yes, made by the bankrupt to Mr. Golden. There seems to be some confusion in the mind of maybe your client, so as long as he has the books, he can get the exact figure.

Mr. Millspaugh: All right, fine.

Mr. Rothschild: In other words, in the letter he wrote me, counsel, he said that the balance due him was \$3676; on the stand he said \$3600.

Mr. Millspaugh: I don't think we can dispute that.

The Referee: Get the figures, as long as you are [24] submitting it.

Mr. Millspaugh: All right, fine.

The Referee: Submitted.

Mr. Gonick: Now, your Honor, still continued——

Mr. Rothschild: Let me ask you this. What is your man prepared to do now on the stock in trade that he used?

Mr. Gonick: Well, I believe that—How much was his interest now—a Hundred Dollars?

Mr. Rothschild: We have got all different kinds of figures. About Three Hundred Dollars and——

Mr. Golden: I don't know anything about that.

Mr. Rothschild: Here is a man who kept no inventory. We have just got to guess. We know from going over his bills that he made substantial purchases of meat.

Mr. Gonick: Well, I don't think they were kept for more than twenty days. I mean, the nature of the business is such that no restaurant man—He's here; you can put him on the stand again.

Mr. Rothschild: I will say this, counsel, after hearing your witness on the stand, I am prepared to make a petition and put the burden on you to come in and show what he has done. Here is a man that has just flaunted the Bankruptcy Act, gone on operating——

Mr. Gonick: Have you seen the restaurant? It's about half as big as this room here. [25]

The Referee: Mr. Gonick, the only matter be-

fore me is continued examination of the bankrupt and he is here.

Mr. Rothschild: Take the stand, Mr. Pagliaro.

ANGELO PAGLIARO

the bankrupt herein, having been previously sworn by the Referee, testified as follows:

Direct Examination

By Mr. Rothschild:

Q. Mr. Pagliaro, since the last examination, have you ascertained any additional facts with reference to your former businesses in Los Angeles?

A. No, sir.

Q. Where are copies of the income tax returns filed by you for the last three years?

A. Well, I had them at my previous home.

Q. You mean, in Los Angeles?

A. 8821 South Haas.

Q. That's the last time you saw them?

A. That's right.

Q. And your income tax returns were filed with the Collector of Internal Revenue at Los Angeles.

A. Yes, sir.

Q. When is the last time you filed income tax return? A. '48.

Q. '48? A. 1948.

Q. That was filed in '49?

A. No, I didn't file for 1949. [26]

Q. No, that was filed in 1949.

A. Oh, yes, sorry.

(Testimony of Angelo Pagliaro.)

Q. In other words, during 1948, did you have an income? A. Yes, sir.

Q. And during 1949, did you have any income?

A. Well, all this came up in '49.

Mr. Gonick: When you are referring to income, you mean a net income, I assume.

Mr. Rothschild: I think the form of return calls for a gross income of \$5000.

Q. Did you have a loss for the year 1949?

A. 1949, everything was so mixed up, I don't know anything that happened in 1949, except that I borrowed money from the race track try to come out that way. You fellows have a record of that; you know all that.

Q. I don't know that I have heard you say that.

A. Yes, sir.

Q. You told us that you left the restaurants in Los Angeles and just left them there.

A. The sheriff had possession of the restaurants at the time I left.

Q. The sheriff had possession? A. Yes, sir.

Q. Do you know who sued you and in what action the sheriff was in possession?

A. I don't remember the sheriff's name but this California Vending Machine is the last one that was in there. Previous to [27] that it was——

Q. Do you know whether the sheriff sold the restaurants?

A. I don't know anything that happened after that.

(Testimony of Angelo Pagliaro.)

Q. You have never heard?

A. Never heard.

Q. You told us last time you believe your wife had the restaurants.

A. That's what I heard through my sister told me that. She is operating it. I didn't see it myself.

Q. That your wife operated it?

A. Yes, my first wife.

Q. Now, do I understand that your first wife owns one of the restaurants?

A. I don't know whether she does or not legally or what have you, but my sister told me she was operating it. She could be a waitress there for all I know.

Q. Now, at the time you filed—Withdraw that. During the month of August and September, what was the average amount of canned goods that you had on hand in this restaurant in Berkeley? I am speaking of August and September of 1950.

A. I still maintain I have to operate at least a Hundred Dollars or Two Hundred Dollars on hand and operate a business so——

Q. Is that canned goods now?

A. Canned goods and fresh meats and everything concerned feeding the public. That's standard inventory for a small place. [28]

Q. A Hundred Dollars or Two Hundred Dollars.

A. Well, anywhere from a Hundred to Two Hundred Dollars. It could be 125 or 150 or it could be a Hundred Dollars even.

(Testimony of Angelo Pagliaro.)

Q. And on September 5, 1950, how much cash did you have in the cash register?

A. I mean, that is the date of the filing of the petition.

Q. (By The Referee): Didn't you testify to that once before, Mr. Pagliaro? A. Yes, sir.

Q. Didn't you say you had so much in the bank every morning? A. Yes, sir.

Q. How much was that?

A. Well, we opened up with \$30 in change.

Q. That's what he wants to know. Now, did you have more than \$30 that day, do you know?

A. Well, my wife had all the money. I think she has testified to that.

Q. I am just asking you now.

A. Well, I don't remember; I don't know.

Q. You are just sure about the \$30 she had.

A. Yes, that's to open up with.

Q. (By Mr. Rothschild): Did you take any canned goods out of the restaurant?

A. We didn't take anything. That restaurant in Berkeley, we didn't take anything out of it; we took ourselves out of it.

Mr. Gonick: You mean any left at the restaurant. [29]

Q. Any left any time after September 5, 1950.

A. We didn't even take time to wash the dishes—right around six o'clock; right in the middle of dinner.

Mr. Gonick: It is conceded, of course, that he

(Testimony of Angelo Pagliaro.)

consumed the stock in the course of trade. There is no question about that.

The Referee: It must be now conceded he had certain assets belonging to the creditors that now belong to the trustee at the time he filed his petition in bankruptcy, too. He had Thirty Dollars in change and by his own testimony, to run that kind of a business, he had to have somewhere between One Hundred and Two Hundred Dollars worth of stock.

Mr. Gonick: I believe that would be necessarily conceded and it would have to be restored to the estate.

Mr. Rothschild: I am waiting to hear, right now, counsel, about what proposition your client is making about restoring this to the estate.

Mr. Gonick: Since I am speaking for him, whatever the Court finds that figure to be, and apparently there seems to be some leeway here, a finding will have to be made on it; we can't reach it by stipulation. It will be up to him to simply furnish that amount of cash to the trustee. I think there is no question about it. That's our offer.

The Referee: The Court actually did make his finding [30] somewhere between 130 and 230; I am accepting his lowest figure and \$30 in change, but I don't want to be in the position of being the bargainer. I think that you two gentlemen, knowing my feelings, ought to be able to get together as far as the bankrupt is concerned if he ever wants a discharge.

(Testimony of Angelo Pagliaro.)

Mr. Gonick: He will have to furnish that money. I have already advised the bankrupt whatever cash that belongs to the estate, he has got to make it good. Needless to say, it was perishable—I mean, except the canned goods. If he didn't sell it to the customers, it would be lost to the estate.

The Witness: Pardon me, Mr. Gonick, Mr. Golden had to pay for that stuff anyway. It was on credit. Mr. Golden states he paid for it after I left—that he even said that right in his chair a little while ago, the grocery bill was \$88 and so on and so forth, so we didn't actually own it. We didn't own it. We didn't pay for it. There was no money. If there was, I would be there making it right now, paying everybody off. I'm working twenty hours a day now; I can't get nowhere.

The Referee: Counsel, I'll continue this matter two weeks and in the meantime, you see to it that the bankrupt makes a payment to the trustee and if not, he is to return at that time, do you understand?

Mr. Gonick: Just a minute. I was just wondering if [31] we could somehow determine on the amount. I mean, this goods wasn't purchased on conditional sales contract, was it?

The Referee: He just mentioned it was sold on credit. Wasn't it sold on credit?

The Witness: Yes, sir.

The Referee: The title wasn't recorded in the seller.

Mr. Gonick: I can see there is a moral position there but I recognize that the law is not on our

(Testimony of Angelo Pagliaro.)

side. I would just like to ask my client, not necessarily on the record——

The Referee: I'll give you five minutes.

(Discussion off the record.)

Mr. Rothschild: We will stipulate, if your Honor please, that there was \$150 worth of merchandise on hand at the time of the filing of the petition and \$30 cash, a total of \$180. We ask that an order be made directing the bankrupt to turn that sum over to the trustee.

The Referee: So ordered. First meeting of creditors concluded?

Mr. Rothschild: Concluded.

The Referee: Is that satisfactory, Mr. Gonick?

Mr. Gonick: Well, it is as to the amount. However, it's going to take my client a little bit of time to get [32] that together.

The Referee: As far as that is concerned, you can work that out with the attorney for the trustee. Then you are satisfied with the——

Mr. Gonick: I am satisfied with the amount.

Mr. Rothschild: As far as concluding the matter, may it be understood, Mr. Gonick, if I need Mr. Pagliaro for further examination——

Mr. Gonick: You can have him.

The Referee: As far as the time element is concerned, it may be worked out by the counsel for the bankrupt and counsel for the trustee. In other words, it's not forthwith. [33]

State of California,
County of Alameda—ss.

I, Mary Ruth Kassabian, do hereby certify:

That I am the official reporter of the Bankruptcy Court; that on the 30th day of January, 1951, I fully, truly and correctly took down in shorthand writing all of the proceedings had in said court and cause at Room 1104, Tribune Tower, Oakland, Alameda County, California; and thereafter fully, truly and correctly transcribed the same into long-hand typewriting and that the foregoing pages 1 to 33, inclusive, are a full, true and correct transcript of my shorthand notes taken at the time and place therein stated.

In Witness Whereof, I have hereunto set my hand this 2nd day of May, A.D. 1951.

/s/ MARY RUTH KASSABIAN,
Reporter.

[Endorsed]: Filed May 7, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-

entitled matter and that they constitute the record on appeal herein as designated by the parties:

Order of Adjudication and Reference.

Order Approving Trustee's Bond.

Petition for Turn-Over Order.

Order to Show Cause.

Answer to Petition of Trustee for Turn-Over Order and Petition for Reclamation of Assets Held by Trustee.

Answer to Petition for Reclamation of Assets.

Turn-Over Order.

Petition for Review of Referee's Turn-Over Order and Denial of Petition in Reclamation.

Amended Petition for Review of Referee's Turn-Over Order and Denial of Petition in Reclamation.

Referee's Certificate on Petition to Review.

Opinion and Order Reversing Order of Referee.

Notice of Appeal.

Designation of Contents of Record on Appeal.

One Volume Reporter's Transcript.

Golden's Exhibit No. 1.

In Witness Whereof, I Have Hereunto Set My Hand and Affixed the seal of said District Court at San Francisco, California, this 5th day of September, 1951.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 13082. United States Court of Appeals for the Ninth Circuit. John Costello, Trustee of the Estate of Angelo Pagliari, Bankrupt, Appellant, vs. C. N. Golden, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13082

JOHN COSTELLO, Trustee of the Estate of
ANGELO PAGLIARO, Bankrupt,
Appellant,

vs.

C. N. GOLDEN,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT ON AP-
PEAL

Comes now John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 19(6) of the above-entitled Court specifies the following as a Concise Statement of Points, the points on which said Appellant intends to rely on the Appeal heretofore filed herein from the Order made and entered in the above-matter by Hon. Edward P. Murphy, Judge of the United States District Court on the 23rd day of July, 1951.

That certain Order of the said District Judge dated the 23rd day of July, 1951, wherein and whereby the Order, Judgment and Decree of Hon. Bernard J. Abrott, Referee in Bankruptcy, made in the above-entitled matter on March 6, 1951, was reversed, was and is erroneous and contrary to law in that

(a) A contract of Conditional Sale is not an

executory contract within the meaning of Section 70(b) of the Bankruptcy Act and, therefore, need not be assumed or rejected by the Trustee within sixty days after adjudication;

(b) That the bankrupt estate will suffer a loss in the nature of a forfeiture if the Appellee is permitted to retain an extra profit through his wrongful act of unauthorized self-help, and the case is a proper one for equitable relief from forfeiture, even if it should be determined that a contract of Conditional Sale is an executory contract within the meaning of Section 70(b);

(c) That the wrongful act of unlawful seizure of assets of a bankrupt estate deprives Appellee of the right to keep extra profits which he would not have realized except for said wrongful act.

Dated at San Francisco, California, this 11th day of September, 1951.

Respectfully submitted,

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,

Attorneys for Appellant, John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF A RECORD
NECESSARY FOR CONSIDERATION OF
APPEAL UNDER RULE 19(6)

To the Above-Entitled Court and to Paul P. O'Brien, Clerk Thereof and to C. N. Golden and to Messrs. Moran & Millspaugh, His Attorneys:

Comes now John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 19(6) of the Rules of the above-entitled Court designate the following as portions of the record, proceedings and evidence which said Appellant thinks necessary for the consideration of the Appeal heretofore filed herein on the 6th day of August, 1951; viz.:

1. Order Adjudicating Appellant Bankrupt.
2. Order Approving Trustee's Bond.
3. (Trustee's) Petition for Turnover Order together with Order to Show Cause thereon issued by Referee on January 18, 1951.
4. Answer of C. N. Golden to said last-mentioned Petition.
5. Answer of Trustee to Petition for Reclamation.
6. (Referee's) Turnover Order, dated March 6, 1951.
7. (Appellee's) Petition to Review Order of Referee and Amended Petition to Review Order of Referee.

8. Reporter's Transcript of Proceedings of January 30, 1951.

9. C. N. Golden's Exhibit No. 1.

10. Certificate and Report of Referee relative to Petition for Review of Referee's Order, dated May 23, 1951.

11. Opinion and Order of District Judge, dated July 23, 1951, Reversing Referee's Order of March 6, 1951.

12. (Appellant's) Notice of Appeal, dated August 6, 1951.

13. Designation of Contents of Record on Appeal filed with District Court.

14. Concise Statement of Points to Be Relied Upon by Appellant on Appeal filed herein.

15. Designation of Parts of the Record Necessary for Consideration of Appeal filed herein.

Dated at San Francisco, California, this 11th day of September, 1951.

Respectfully submitted,

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,

Attorneys for Appellant, John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1951.

